



**The Comptroller General
of the United States**

Washington, D.C. 20548

Decision

Matter of: Elliott Company
File: B-224887.3
Date: May 4, 1987

DIGEST

1. Protest of negative responsibility determination based on preaward survey is timely where protester promptly filed Freedom of Information Act request for preaward survey report after it was found nonresponsive and filed protest within 10 working days of receipt of the report.
2. Protest of contracting officer's negative responsibility determination is denied where the determination was based on a negative preaward survey report which found that the prospective contractor had an unsatisfactory record of prior performance and the record contains documentation that provides a reasonable basis for the preaward survey findings and the contracting officer's determination.

DECISION

Elliott Company protests the Navy's determination that the firm is nonresponsive under request for proposals (RFP) No. N00104-86-R-WH27 for the repair and overhaul of a pressure fired boiler supercharger from the U.S.S. Koelsch. Elliott disputes the preaward survey relied on by the contracting officer to find the firm nonresponsive. We deny the protest.

Proposals were submitted under the RFP by Elliott at \$283,203.72 and BWC Technologies, Inc. at \$287,765; both were found technically acceptable. The contracting officer then requested a preaward survey of Elliott's Donora, Pennsylvania facility, where Elliott would perform the contract, based on the belief that the firm's performance on previous Navy supercharger repair contracts had been deficient. The survey was performed by the Defense Logistics Agency's Defense Contract Administration Services Management Area, Pittsburgh (DCASMA) on November 18, 1986.

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On December 4, DCASMA recommended against award because Elliott lacked sufficient skilled shop personnel with experience in supercharger repairs at its Donora facility, which had resulted in deficient performance on previous Navy supercharger repair contracts.

The survey report states that two superchargers repaired by Elliott for the U.S.S. Sample in 1984, and a third unit repaired for the U.S.S. McDonnell in 1985 had to be returned to Elliott for further work. The survey report also describes Elliott's unsatisfactory work on an air compressor unit for the U.S.S. Midway as another incident reflecting adversely on the firm's capability.

The survey team noted that Elliott had not significantly improved its Donora staff and that the firm proposed to use essentially the same employees under this contract as it had used on the contracts for the U.S.S. McDonnell and the U.S.S. Sample. Although Elliott planned further training for its Donora employees, DCASMA concluded that the proposed training would not solve the personnel problems in time for this contract.

On December 17, based on the DCASMA preaward survey and on the contracting officer's familiarity with Elliott's poor performance on previous contracts, the contracting officer determined Elliott to be nonresponsible. Award was made to BWC on December 17 and, by letter received by Elliott on December 22, the contracting officer informed Elliott that it had been found nonresponsible because of the firm's unsatisfactory performance record.

On December 23, Elliott requested, under the Freedom of Information Act (FOIA), a copy of the preaward survey report. Based on information in the survey report, which Elliott received on January 8, 1987, Elliott filed this protest on January 22, disputing DCASMA's conclusions regarding the firm's capability. Elliott argues that it has added five qualified employees since it overhauled superchargers for the U.S.S. Sample and U.S.S. McDonnell so it now has sufficient personnel skilled in supercharger repair. Also, Elliott says that it is using personnel from its Jeannette, Pennsylvania plant to train and consult with Donora employees to insure a satisfactory overhaul. Elliott says that it demonstrated its current capability by recently correcting, at no cost to the Navy, problems with the U.S.S. McDonnell supercharger originally overhauled by Elliott in 1985.

Elliott also contends that the survey report contains incomplete, inaccurate and misleading information on the firm's past performance. Although the report says that the

firm previously had five Navy supercharger repair contracts, Elliott maintains that actually it has worked on only four Navy superchargers, two for the U.S.S. Sample, and one each for the U.S.S. McDonnell and the U.S.S. Garcia. Elliott notes that its work for the U.S.S. Garcia was acceptable, but this fact was not included in the survey report. Further, Elliott says that its work on an air compressor unit for the U.S.S. Midway should have no bearing on the survey since this solicitation is for the repair of a supercharger unit and, in any event, its work for the U.S.S. Midway is still under review. Elliott also disagrees with DCASMA's conclusion regarding the firm's repair of one supercharger for the U.S.S. Sample. Elliott says that the supercharger ran for more than 15 months after the repair and recent problems with the supercharger cannot be attributed to Elliott since it has not been formally inspected yet.

Initially, the Navy contends that Elliott's protest should be dismissed as untimely. According to the Navy, on November 18, the survey team informed Elliott that it would recommend against award because of the firm's previous performance and inadequate personnel. On December 22, Elliott received the contracting officer's nonresponsibility determination, and on December 23, Elliott discussed the results of the DCASMA survey with a Navy program manager. The Navy argues that on or before December 23, Elliott was aware of "the general reasons" for the negative preaward survey which led to the finding of nonresponsibility. Thus, the Navy argues that Elliott's protest should be dismissed because it was not filed until January 22, 1987, more than 10 working days after the basis of protest was known or should have been known, as provided by our Bid Protest Regulations. 4 C.F.R. § 21.2(a)(2) (1986). The protester, however, argues that it could not specifically detail its objections to the DCASMA survey until after it received the written survey report on January 8.

We find that the protest is timely. Even assuming, as the Navy argues, that Elliott was generally aware of the survey team's judgment of the firm's capability before receiving the DCASMA report, Elliott's January 22 protest challenges specific facts and conclusions contained in the written survey report. Elliott promptly filed a FOIA request for the survey report after it was informed of the nonresponsibility determination, and filed its protest objecting to the survey within 10 working days of receiving it. Under these circumstances, we consider the protest diligently pursued and timely filed. See Carrier Corp., B-214331, Aug. 20, 1984, 84-2 CPD ¶ 197. We therefore will consider the merits of Elliott's protest.

The determination of a prospective contractor's responsibility rests with the contracting officer and, in making that determination, he is vested with a wide degree of discretion and business judgment. Martin Electronics, Inc., B-221298, Mar. 13, 1986, 86-1 CPD ¶ 252. While a responsibility determination should be based on fact and reached in good faith, the ultimate decision should be left to the discretion of the contracting agency since it must bear the brunt of any difficulties experienced during performance of the contract. Firm Reis GmbH, B-224544, et al., Jan. 20, 1987, 87-1 CPD ¶ 72. We, therefore, will not question a negative determination of responsibility unless the protester can demonstrate bad faith on the agency's part or a lack of any reasonable basis for the determination. Amco Tool & Die Co., 62 Comp. Gen. 213 (1983), 83-1 CPD ¶ 246. Here, Elliott has not alleged bad faith by the Navy, nor has it demonstrated that the nonresponsibility determination lacked a reasonable basis.

A prospective contractor that has recently been seriously deficient in contract performance is presumed to be nonresponsible, unless the contracting officer determines that the circumstances were beyond the contractor's control or that the contractor has taken appropriate corrective action. Federal Acquisition Regulation (FAR), 48 C.F.R. § 9.104-3(c) (1986). Here, we have no reason to question the determination by DCASMA and the contracting officer that Elliott's performance record is deficient. That determination primarily was based on Elliott's work on two superchargers for the U.S.S. Sample and one for the U.S.S. McDonnell. The U.S.S. Sample units both experienced problems when they were reinstalled after being overhauled by Elliott. Navy engineers attribute those problems to rotor misalignment during overhaul by Elliott. Elliott does not dispute that one of the units has been returned to the firm for warranty repairs. Nor does Elliott question the Navy's judgment that its repair of the U.S.S. McDonnell supercharger was unsatisfactory.

Elliott says that the DCASMA survey team neglected to report the firm's successful repair of a supercharger for the U.S.S. Garcia and that the survey team should not have considered the firm's work for the U.S.S. Midway since that work involved an air compressor, not a supercharger. Although the survey report does not mention the U.S.S. Garcia, we do not believe that Elliott was prejudiced by this omission since, as the Navy explains, the U.S.S. Garcia unit needed only minor repairs while the U.S.S. Koelsch supercharger needs extensive overhauling similar to that required by the U.S.S. Sample and U.S.S. McDonnell superchargers. Further, it is clear that neither the survey team nor the contracting officer placed undue reliance on

the U.S.S. Midway air compressor repair. The contracting officer, who ultimately determined Elliott to be nonresponsible, did not mention the U.S.S. Midway in his nonresponsibility determination. Thus, we see no basis on which to question the contracting officer's judgment regarding Elliott's previous performance.

Although Elliott maintains that it has taken corrective action since its work on the U.S.S. Sample and the U.S.S. McDonnell, we see no basis to challenge the Navy's determination that the actions taken by Elliott were not sufficient. Elliott says that it added five qualified skilled employees to its Donora staff and that it recently repaired the U.S.S. McDonnell supercharger that it had unsuccessfully overhauled in 1985. According to the Navy, however, the second repair of the U.S.S. McDonnell supercharger was done with close monitoring and assistance by Navy personnel and Elliott still did not correctly align the rotor casing. Moreover, three of Elliott's "additional" employees were managers already at the Donora plant, were known to the survey team and were not involved in hands-on repair of superchargers. Further, the addition of the other employees to its Donora staff was not mentioned by Elliott until its protest was filed. The DCASMA recommendation was based on information made available at the time of the survey, however, and the contracting officer was entitled to make his determination on the basis of the facts on hand immediately prior to award; this determination was not affected by personnel changes after the date of award. See Martin Electronics, Inc., B-221298, supra.

Finally, with respect to the training and in-house consultation proposed by Elliott, since the U.S.S. Koelsch supercharger was in need of immediate repair, the Navy determined that these actions would not improve the firm's capabilities soon enough. Elliott has shown no basis on which to question this determination.

The protest is denied.

for Seymour Efron
Harry R. Van Cleve
General Counsel